**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

(b)(6)

DATE: FEB 22 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal, as well as a subsequent motion to reconsider. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion to reopen, dismiss the motion to reconsider and affirm the dismissal of the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a graphic designer at the , doing business as the . The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding the defined equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO affirmed the director's decision and dismissed the petitioner's appeal, before dismissing the petitioner's motion to reconsider.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*In re New York State Dept. of Transportation* (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner filed the Form I-140 petition on July 6, 2010. The director denied the petition on March 30, 2011. The petitioner appealed the decision on April 29, 2011, and the AAO dismissed the appeal on April 2, 2012. The petitioner filed its first motion to reconsider on May 4, 2012, and the AAO

dismissed that motion on November 27, 2012. The AAO incorporates its prior dismissal notices by reference, and will quote brief sections of those decisions as necessary for context.

The petitioner's initial submission had focused on the esthetic aspects of her work as a graphic designer for the Brooklyn Museum. The petitioner's own description of that work follows:

> Prepares layouts, illustrations, graphic designs and logos for art museum brochures, pamphlets, fliers and related publicity materials, using traditional and computerized design methods. Consults with management concerning employer's objectives for above materials. Creates original graphic designs and images in order to realize employer's goals and attract public interest and goodwill, applying knowledge of form, color, perspective and specialized graphic design techniques.

As one example of her past work, the petitioner submitted excerpts from a booklet published in 2004 while the petitioner worked for the Subsequently, the petitioner claimed that her work on the booklet served the national interest by fostering mutual understanding between the United States and the Islamic world. The AAO, in its April 2012 dismissal notice, stated:

> The petitioner and her witnesses have consistently claimed that the petitioner's work has contributed to improving the image of the United States in the eyes of Muslims in the Middle East, but the record contains no evidence from the Middle East to provide any first-hand support for that claim.

With respect to a list of the petitioner's recent projects at the the AAO also stated:

> These exhibits involved artifacts from the Roman Empire, pharaonic Egypt, and Assyria – all civilizations which collapsed hundreds of years before the emergence of Islam in the seventh century CE. It is not clear how often, if at all, future exhibitions will address the question of mutual understanding between the Muslim and non-Muslim communities. The record does not indicate that the petitioner has any authority over the selection of subjects for future exhibitions. The assertion that the petitioner's work fosters understanding of Islam, therefore, rests on a single project.

In its November 2012 dismissal of the petitioner's first motion, the AAO stated:

> [T]he petitioner created the artwork for the booklet while working for the She left that employer in 2004, and the record does not indicate that she has undertaken any subsequent projects with the goal of fostering understanding with the Islamic world. The AAO previously noted that the petitioner's work at the concerned historical periods long before the founding of Islam. The petitioner left the early in 2010, and later that year began working for the . The petitioner has not shown how

> the 2004 booklet will continue, prospectively, to serve the national interest. This one project does not establish a pattern of influence that would justify the expectation that such influence will continue.

On motion, the petitioner submits evidence showing that it was the petitioner's spouse, not the petitioner, who accepted employment at the Counsel states that the AAO "made an egregious error of fact by confusing the petitioner . . . with her husband. . . . This error severely prejudiced the petitioner, because it led the AAO to make a clearly erroneous factual conclusion on an issue of fundamental importance."

The record shows that the reference to the charter school was, in fact, erroneous. The petitioner had submitted copies of her spouse's pay receipts from the school, which the AAO evidently mistook for evidence of the petitioner's own employment. The same evidentiary submission, however, included the petitioner's own July 1, 2010 declaration that she had been "unemployed" since January 2010, entirely consistent with the AAO's statement that "[t]he petitioner left the early in 2010."

The AAO mentioned the only once in its November 2012 decision, in the third paragraph from the end of that eight-page decision. The discussion preceding that point made it clear that the charter school reference was not the deciding factor; the AAO would have arrived at the same outcome even without mentioning the charter school.

The petitioner submits evidence to support counsel's assertion that the petitioner "returned to work for the . . . in December 2011 and is still employed by that museum." Counsel asserts that the AAO failed to take into account the "temporary" nature of the petitioner's departure from the Brooklyn Museum, but the latest motion is the first time the petitioner mentioned the resumption of that employment. The petitioner had not included that information in the May 2012 motion. As noted previously, the regulation at 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider must, when filed, establish that the initial decision was incorrect based on the evidence of record at the time of the initial decision. The petitioner has not shown that the AAO drew the wrong conclusion from the evidence of record (as opposed to evidence that existed, but which the petitioner had not submitted).

Counsel states:

> The AAO erroneously failed to give due weight to one of the authorities who submitted a letter in support of the NIW petition, Professor who is unquestionably one of America's leading experts on Jewish-Muslim relations. . . . The AAO's failure to give due weight to Professor opinion was, at least in part, influenced by the AAO's own factual error regarding material that was in the record before it on appeal, an error which was incorporated by reference in the November 14, 2012 Decision.

The purported error in question appears in the following passage from the AAO's April 2012 decision:

> Professor . . . stated that the "booklet will enable many Americans to replace negative stereotypes which they now hold about Islam with a more balanced and positive view, based on an accurate portrayal of this great world culture." Prof. praised the booklet and stated that the petitioner's use of geometric design "has been instrumental in enabling Americans to understand and appreciate this important part of Muslim art and culture."
>
> The record contains no circulation figures for the booklet, and no demographic information to show the extent to which the petitioner's graphic design of the booklet (as opposed to elements of the booklet outside the petitioner's control) has improved Americans' understanding and appreciation of Islamic culture. Therefore, any assertion to the effect that the booklet – and specifically the petitioner's work on the booklet – has improved American understanding of Muslim culture appears to be unsubstantiated speculation.

As counsel acknowledges, the above passage appeared in the AAO's first decision in April 2012, although counsel did not dispute the passage in the May 2012 motion. Counsel claims that the quoted passage was erroneous because "the record did in fact contain circulation figures for the booklet." Specifically, the petitioner submitted "a letter from The dated April 28, 2011 stating that 2,500 copies of the booklet were printed and that it was distributed to 730 ." The AAO did not overlook that letter, as counsel claims. Rather, the AAO acknowledged and quoted that letter. From the April 2012 decision:

> To support the reference to "the widespread distribution of the booklet," the petitioner submits a letter from assistant counsel of the who states "2,500 copies of this booklet were printed. Copies were distributed to 730 " Counsel fails to explain how these figures establish "widespread distribution." The petitioner submits nothing to show that 2,500 copies is a particularly large print run for a publication of its kind, or the extent (if any) of the booklet's distribution outside the public school system.

In context, the AAO's comment about "circulation figures" was imprecise, but not incorrect; the AAO stated, in effect, that the petitioner had not established the booklet's distribution outside of the local school system. Ms. did not specifically say that the public school system received all of the booklets. If the schools did receive all of the booklets (which would be the only way that the letter accounted for the booklet's "circulation" rather than the size of its print run), then their distribution was limited to a particular locality. If, on the other hand, other copies remained, the petitioner has not indicated what happened to them, and the petitioner has not shown that the AAO arrived at the wrong conclusion in this regard.

The question of the booklet's distribution is central to assertion that the booklet "has been instrumental in enabling Americans to understand and appreciate this important part of Muslim art and culture." The booklet can have such an effect only on those who have read it. If the distribution was largely limited to one city's public school system, as counsel appears to acknowledge on motion, then it is not evident how the booklet could have had a broader impact.

Regarding the figures in Ms. letter, counsel states:

> While these may not seem like large numbers in absolute terms, it is still not unreasonable to conclude that hundreds, if not thousands of school children in all likelihood had access to the booklet, and that since the booklet was published by one of the most famous museums in America and the world, it had an influence for [*sic*] beyond .

Counsel's claims are vague, general, and speculative. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Conjectural assertions about how many students "in all likelihood had access to the booklet" say nothing about how many students actually read the booklet, or how many of them changed their attitudes about Islam and the Middle East based on the graphic design of the booklet.

Counsel observed "there was also additional 'demographic' evidence submitted with the appeal, namely an Internet printout showing that there were no less than 246 sites linking to the booklet, and that there had been 7,283 views." The printout in question from listed the "[s]ites linking to this publication," *i.e.*, to the booklet. Most of the listed "sites" are, in fact, results pages from search engines such as Bing and Yahoo. Some others appear to be electronic mail messages. The "7,283 views" does not distinguish between one-time visitors and repeat visitors; a single reader who referred back to the booklet several times might count multiple times in the cited total. The petitioner submits no comparative data to show that the petitioner's book has seen particularly wide distribution (as opposed to the potential for such distribution).

Counsel acknowledges that "reasonable people can concededly differ over the significance of these figures," but asserts that the AAO erred by "ignor[ing] them completely" and, thereby, "dismiss[ing] the opinion of a noted authority such as Dr. out of hand." Dr. comments about how the booklet has changed attitudes about Islam are, inescapably, intertwined with the question of how many people have had meaningful exposure to the booklet. A handful of questionable figures, some devoid of meaningful context, do not establish a preponderance of evidence in the petitioner's favor. Even then, this dispute over details glosses over the larger point, which the AAO treated at length in previous decisions. Specifically, the AAO found that the petitioner had presented no credible evidence that the graphic design of a booklet about Islamic art has had significant impact on Islamic-American relations, a claim that became the keystone of the petitioner's waiver claim at some point after the filing of the petition. As the AAO has discussed at length in previous decisions, the petitioner was not the author or principal creator of the booklet. Rather, she handled its graphic design. Therefore, even if the

petitioner had established that the booklet is widely read and influential (which the petitioner has not done), the petitioner would also have to show that the graphic design of the booklet was an important facet of its impact and influence.

Because (1) the petitioner's own evidence made no reference to her re-employment in 2011; (2) the erroneous reference to was a peripheral observation that did not change the basic outcome of the decision; and (3) the petitioner has shown no prejudicial error regarding letter and the booklet's circulation, the petitioner has not shown that the AAO's decision was incorrect based on the evidence available at the time. The AAO will therefore dismiss the motion to reconsider.

The AAO will, however, grant the motion to reopen, because it includes material new evidence. As noted previously, the has re-hired the petitioner. The petitioner submits a copy of a 2012 job announcement from the web site, which reads, in part:

> Associate Curator of Islamic Art – Exhibitions
> (Full-time, permanent, non-union position)
>
> The seeks to appoint an Islamic art specialist to the endowed position of Hagop Kevorkian Associate Curator of Islamic Art. This is a permanent 21-hour per week position. . . .
>
> The successful candidate must have, at minimum, an advanced degree in the history of Islamic art (Ph.D. preferred). . . . [A] reading knowledge of Arabic and/or Persian is requisite. . . .
>
> Work Schedule: Full time, 35 hours per week.

Counsel did not explain the relevance of this job announcement. The petitioner, who holds only a bachelor's degree in graphic design and no degree at all in "the history of Islamic art," does not appear to be qualified for the position. The AAO notes that the job announcement contains contradictory information about the work schedule (21 hours per week versus 35). At best, the announcement establishes that the collects Islamic art.

The petitioner submits a copy of a December 10, 2012 letter from human resources officer at the who states:

> The still intends to offer [the petitioner] permanent employment . . . as a Graphic Designer . . . in connection with preparation and promotion of a great variety of our exhibits promoting inter-cultural tolerance and understanding, including but not limited to exhibits related to the art and culture of the Islamic world.

The letter is consistent with the AAO's prior conclusion that the petitioner's work at the Brooklyn Museum would not specialize in Islamic art, despite the single-minded focus on Islamic art that formed the core of the national interest waiver claim.

The petitioner submits printouts from the [redacted] web site, detailing two exhibitions: "[redacted] described as a "Long-Term Installation," and [redacted]" which ran from June 5 to September 6, 2009. The petitioner submits no evidence that she participated in the design of those exhibitions, or that the design of those exhibitions has contributed in any discernible way to mutual Islamic-American understanding. The printouts do not rebut the AAO's prior statement: "The record does not identify any projects by the petitioner during her five years at the [redacted] that addressed understanding of Islamic art." New evidence that the museum handles Islamic art does not force or imply the conclusion that the petitioner was involved in the projects identified on motion. Even if the petitioner was involved in those projects, the petitioner did not mention them before the second motion, making it difficult to claim, at this late juncture, that the newly-mentioned projects were of particular importance.

The petitioner's motion has touched on specific points in prior AAO decisions, but has not addressed the fundamental issues underlying the AAO's dismissal of the appeal and the first motion. The petitioner has not shown that the prior decisions contained prejudicial errors that, by themselves, prevented the AAO from withdrawing the director's decision or approving the petition outright. The errors alleged on motion are either peripheral, or else are not "errors" at all. The newly submitted evidence clarifies the extent of the [redacted]s involvement in Islamic Art, but sheds no new light on the central claim that, as a graphic designer involved in preparing museum exhibits, the petitioner has had and continues to have a significant role in improving understanding and acceptance of Islamic cultures.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The AAO's decision of November 14, 2012 is affirmed. The petition remains denied and the appeal remains dismissed.